

IN THE MATTER OF LICENSE NO. 356465 MERCHANT MARINER'S DOCUMENT NO.
Z-1031639-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Reginald W. McKAIL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1815

Reginald W. McKAIL

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 3 December 1969, an Examiner of the United States Coast Guard at Portsmouth, Virginia, suspended Appellant's seaman's documents for six months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as third assistant engineer on board SS PLYMOUTH VICTORY under authority of the document and license above captioned, Appellant:

- (1) on 26 October 1969, at Kawaihae, Hawaii, failed to stand his 1600-2400 watch;
- (2) on 10 November 1969, while the vessel was transiting the Panama Canal, failed to obey a lawful command of the Chief Engineer to assist in the fire room at a time of engineering difficulties; and
- (3) on 10 November 1969, while the vessel was transiting the Panama Canal, used profane language toward the Chief Engineer.

At the hearing, Appellant did not appear. The Examiner entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of PLYMOUTH VICTORY and the testimony of three witnesses.

There was no defense.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months on twelve months' probation.

The entire decision was served on 3 December 1969. Appeal was timely filed on 29 December 1969 and perfected on 16 March 1970.

FINDINGS OF FACT

On all dates in question, Appellant was serving as third assistant engineer on board SS PLYMOUTH VICTORY and acting under authority of his license and document.

On 26 October 1969, Appellant failed to stand his 1600-2400 watch aboard the vessel at Kawaihae, Hawaii.

On 10 November 1969, while the vessel was transiting the Panama Canal, Appellant failed to obey a lawful command of the chief engineer to assist in the fire room during a period of difficulty, and used profane language to the Chief.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that Appellant was denied constitutional rights because the hearing was commenced less than twenty-four hours after the charges were served under thus depriving Appellant of his right to counsel and opportunity to prepare his defense, despite Appellant's stated desire to have his hearing at New York.

APPEARANCE: Standard, Weisberg, Heckerling & Rosow, of New York, N.Y., by Aaron J. Ballen, of counsel.

OPINION

I

Despite the fact that the Examiner's order in this case was issued at Portsmouth, Virginia the hearing was actually held at Savannah, Georgia, on 17 November 1969. The charges were served and notice of hearing given on 16 November 1969.

The first question that must be faced here is whether a notice served one day for appearance at hearing the next day is per se such a fault as to require setting aside of any proceedings that took place on the date for which notice had been given. Some realities must be examined first.

R.S. 4450, even as amended in 1936, long antedates the law governing administrative procedure adopted in 1945. There can be no doubt that R.S. 4450 was designed to provide for an expeditions handling of cases which might allow for the taking of testimony of seamen serving aboard ships before they might be dispersed and have become unavailable. The laws governing administrative procedure

were designed to expedite hearings without resort to lengthy court proceedings. There is no conflict in spirit between 46 U.S. C. 239 and 5 U.S.C. 551-559.

A realistic view shows that seamen, the primary source of evidence in hearings held under 46 U.S.C. 239 and 46 CFR 137, are usually readily available on the day of payoff of a crew and are likely to disperse within a short time thereafter. It is desirable that compulsory process, to hold a seaman at his port of payoff, be issued at the time of payoff so that he will be available to give testimony at an expeditious hearing before he has left the place of hearing.

It follows that notice of hearing to the party whose case is to be heard must be just as expeditious and timely. That person should be brought to hearing while the witnesses against him are readily available for testifying and for cross-examination. The fact that a person charged in Savannah wants a lawyer from New York and would prefer to go immediately to his family in New York does not mean that he has a constitutional right to disregard the notice to appear in Savannah for opening of the hearing the day after the charges were served any more than a witness under subpoena to appear the day after he was served with process could argue that the wanted to go to Dubuque and that therefore the subpoena was meaningless as to him.

A person charged in Savannah has no constitutional right to have his hearing transferred to New York because the lawyer of his choice has his office in New York, although he does have the right to representation by counsel. If he can get his New York lawyer to Savannah in a reasonable time he has the right to do so. If he seeks unreasonable delay to obtain the lawyer of his preference, because of some unavailability, he must have recourse to some other attorney of his choice. If he desires change of venue for good cause he may present his argument therefor. All of these principles, however, require that the person appear before the designated examiner to ask for delay or to ask for change of venue. Delay or postponement and change of venue are matters to be settled by the examiner before whom the party first appears. A person may not, as in the instant appeal, flout the process duly served upon him and then, not having appeared for hearing, demand that his desires before hearing should have been granted even before they were stated.

As a practical matter it must be noted that the needed witnesses were available in Savannah on the day after the charges were served and they appeared. Appellant could as well have been available to protest the proceeding.

On this point I must rule first that there is no set time within service of charges under R.S 4450 and 46 CFR 137 and the opening of hearing on the charges which must be held unreasonable as a matter of law. The principle in Decisions on Appeal Nos. 702 and 713 still obtain.

The remedy for the person served with charges is to appear before the examiner and to ask for delay or change of venue. Absolute disregard of the charges and notice to appear, as occurred in this case, cannot be tolerated.

ORDER

The order of the Examiner dated at Portsmouth, Va., on 3 December 1969, is AFFIRMED.

C. R. Bender
Admiral, United States Coast Guard
Commandant

Signed at Washington, D.C., this 2nd day of September 1970.

INDEX

Due process

Defense, time to prepare

Hearings

Place where held

Time to prepare defense

Venue

Witnesses, availability of